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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation	)))	WT Docket No. 95-157 RM-8643

REPLY COMMENTS OF SOUTHWESTERN BELL MOBILE SYSTEMS, INC.

Respectfully submitted,

SOUTHWESTERN BELL MOBILE SYSTEMS, INC.

Glen A. Glass
Vice President and General Attorney
Carol Tacker
General Attorney
Cory Kale
Attorney
17330 Preston Road, Suite. 100A
Dallas, Texas 75252
(214) 733-2000

ATTORNEYS FOR
SOUTHWESTERN BELL MOBILE SYSTEMS, INC.

December 21, 1995

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SUMMARY

The Commission and various commentors have identified six principle areas of interest bearing upon cost-sharing issues as well as other aspects of the microwave relocation rules under ET Docket No. 92-9: whether to clarify the definition of "good faith" negotiations during the mandatory negotiation period; whether to adopt the use of the Proximity Threshold to determine interference rather than TIA Bulletin 10 F; whether to clarify the definition of "comparable facilities"; whether to clarify Commission Rules that grant relocated microwave licensees a twelve (12) month trial period; whether to continue granting 2 GHzs microwave applications on a primary basis during the relocation process; and, whether to place time limits on a PCS licensee's obligation to provide "comparable facilities".

In reply, Southwestern Bell Mobile Systems, Inc. (SBMS) supports the establishment of a rulemaking which addresses the issues mentioned above with the following modifications:

(1) A good faith requirement during the voluntary negotiation period;

(2) Rejection of the use of the Proximity Threshold method to determine interference;

(3) An amended definition of "comparable facilities";

(4) Suitable qualifications and safeguards to the twelve (12) month trial test period;

(5) New proposed interference criteria;

(6) Relevant depreciation start dates as part of the cost-sharing formulae;

(7) Industry composition and selection of a cost-sharing clearinghouse with the ability, however, of private parties to reach their own cost-sharing arrangements without necessarily

resorting to the use of the clearinghouse.

(8) Stipulated changes concerning interim licensing between primary and secondary status licensees; and

(9) Full implementation of a viable alternative dispute resolution mechanism predicated upon binding arbitration under the American Arbitration Association rules for handling commercial disputes.

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I. INTRODUCTION

Southwestern Bell Mobile Systems, Inc. ("SBMS") files these reply comments in support of the establishment of a rulemaking regarding a plan for sharing the costs of relocating microwave facilities currently operating in the 1850 to 1990 MHz ("2 GHz") band, which has been allocated for use by broadband Personnel Communications Services ("PCS"). On May 5, 1995, Pacific Bell Mobile Services ("PBMS") filed a Petition for Rulemaking seeking the imposition of specific rules regarding the sharing of microwave relocation costs.[1] In support of the PBMS Petition, SBMS filed initial and informal supplemental comments with the Federal Communications Commission (the "FCC" or "Commission").[2] On October 12, 1995, the Commission adopted a Notice of Proposed Rulemaking for the Amendment of certain Commission rules regarding a plan for sharing the costs

[1]Petition for Rulemaking of Pacific Bell Mobile Services, May 5, 1995 (the "PBMS Petition"); See, *Public Notice*, Report No. 2073 (May, 16, 1995).

[2] See, SBMS Comments filed June 15, 1995 (SBMS Initial Comments); Informal Supplemental Comments of Southwestern Bell Mobile Systems, Inc. in Support of the Petition for Rulemaking of Pacific Bell Mobile Services, filed June 27, 1995 (SBMS Supplemental Comments).

of microwave relocation.[3] SBMS supports the FCC's goal of modifying the transition rules for relocation as well as the adoption of a cost-sharing plan so as to enable PCS providers to move expeditiously towards the deployment of PCS services.[4] In sum, SBMS supports the establishment of a rulemaking which addresses the issues contained in the Notice with the following clarifications and modifications described below.

II. THE COMMISSION SHOULD ADOPT A GOOD FAITH REQUIREMENT DURING THE VOLUNTARY NEGOTIATION PERIOD

While the Commission has proposed a good faith requirement during the mandatory negotiation period, no parameters have been established for how negotiations are to be conducted during the voluntary period.[5] Because current relocation guidelines only require the parties to negotiate in good faith during the mandatory negotiation period, the clear inference is that the parties who are intent on formulating a timely and viable relocation agreement need not necessarily conduct their negotiations in good faith. SBMS recommends that the rules governing relocation and compensation for relocation costs be modified to mandate good faith negotiations between PCS providers and microwave incumbents at any time. The FCC's tentative conclusion that an offer by a PCS licensee to replace a microwave incumbent's system with "comparable facilities" may constitute a "good faith offer " during the voluntary as well as mandatory period would help focus relocation negotiations on the true ultimate objective, i.e., supplying the incumbent with a comparable system within the needed timeframe of the PCS provider. Indeed, the Uniform Commercial Code which

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[3] Notice of Proposed Rulemaking, WT Docket No. 95-157 (October 12, 1995) (hereinafter "Notice").

[4] See, SBMS Comments filed November 30, 1995 (SBMS Comments).

[5] Notice, para. 68.

governs the offers, acceptances, performance and enforcement of virtually all domestic commercial agreements contains a universal requirement that every agreement be negotiated, bargained and performed in good faith.[6] This standard should be adopted by the Commission for the negotiation of voluntary relocation agreements.

In the alternative, should the Commission elect not to impose a duty to bargain in good faith upon the PCS provider and microwave incumbent during the voluntary period, SBMS supports the Congressional recommendation that the voluntary negotiation period be shortened from two years to one year.[7]

SBMS strongly supports the commentors that state the voluntary negotiation period serves no purpose other than to permit incumbents to take advantage of PCS providers. Although there is no question that incumbents are to be guaranteed a comparable system and a seamless transition to "new" facilities, the voluntary negotiation period merely provides leverage for their frequent demands for unwarranted premiums. PCS providers and the general public should not have to wait two years to begin the relocations necessary to deploy PCS services.[8]

III. THE COMMISSION SHOULD ADOPT A CLARIFICATION OF ITS COMPARABLE FACILITY DEFINITION

A. Comparable Facility Criteria

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[6] See, U.C.C. § 1-203, Obligation of Good Faith, (Official Text).

[7] See, US House of Representative's recommendation that the voluntary negotiation period established by the Third Report and Order in ET Docket 92-9 be shortened from two years to one year; See, Recommendations of House Committee on Commerce pursuant to the concurrent resolution on the budget for fiscal year 1996 (agreed to by voice vote on Sept. 13, 1995).

[8] See, SBMS Comments, pp.2-3; AT&T Wireless Services Comments, pp.15-16; Intercel Comments, p.4; Pacific Bell Comments, pp.8-9; PCS Primeco Comments, p.16; PCIA Comments, pp.11-15; Sprint Comments, p.10.

Current Commission rules require PCS licensees to provide microwave incumbents with "comparable facilities".[9] SBMS submits that "comparable facilities" should always be defined as facilities equal to, but not superior to existing facilities. The Commission should enlarge and modify its factors for determining when a microwave facility will be deemed comparable to include the criteria set forth in the SBMS Supplemental Comments.[10] For a microwave facility to be comparable it should have: 1) the existing channel capacity of the relocated path; 2) equivalent reliability as the relocated path; 3) the new frequency with the same growth potential in terms of the ability to expand the capacity of the identified microwave link in the new spectrum (i.e., 6 GHz or 11 GHz, etc.); and 4) the availability of backup facilities if, and only if, the existing facilities provide redundancy.

In a similar vein, to meet the comparability standard, the alternative media facilities, such as fiber, should have: 1) the existing channel capacity of the relocated path and 2) the equivalent path reliability, growth potential, and routing capabilities offered by the existing microwave path.

B. PCS Providers' Responsibilities Should Be Limited to Providing a System of Comparable Quality

SBMS supports the FCC's conclusion that PCS licensees are not required to replace existing analog with digital equipment when an acceptable analog solution exists.[11] The purpose of having relocation rules at all are to assure a "seamless" transition for microwave incumbents, not to increase the costs of providing PCS services as a result of constructing two rather than one new network. The Commissions' rules have always been clear in requiring that PCS providers only provide incumbents

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[9] See, 47 C.F.R. Section 94.59 (c)(3); See also ET Third Report and Order, 8 FCC Rcd 6589.

[10] See, SBMS Supplemental Comments, pp. 2-5.

[11] Notice, Para. 77.

with a comparable, not an upgraded, system. If incumbents with links using analog technology desire to obtain digital equipment that exceeds the parameters of their current system, they alone should bear the additional cost. This method gives an incumbent the choice of accepting either a fully constructed comparable system or a cash payment for the cost of a comparable system, which could then be used to obtain upgraded equipment. However, should the incumbent choose to have an upgraded system installed or, to install its own comparable system, it should bear the costs of remedying any problems that might occur with the new system. PCS providers should not be held responsible for the performance of relocated systems which they did not design and/or construct.

IV. MODIFICATIONS TO THE TWELVE MONTH TEST PERIOD ARE REQUIRED

Existing Commission rules provide for a twelve (12) month trial period for relocated microwave incumbents to test their new facilities.[12] SBMS believes the following safeguards must be in place before any trial period is adopted by the Commission:

A. Incumbent Authorizations Should be Surrendered to the FCC During the Test Period

SBMS agrees with the Commission that the test period should run from the time the microwave licensee commences operations of its new system. The incumbent, however, should be required to return its license to the FCC upon cutover to the new system. Permitting microwave licensees to retain their licenses during the test period will only cause confusion as to when the test period expires as current rules provide no adequate closure mechanism for this twelve (12) month corrective period.

B. A Test Period Should Be Waiveable By Contract

The Commission should make clear that the test period is fully waiveable by the incumbents

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[12] 47 C.F.R. Section 94.59 (e).

by contract. The parties to a relocation agreement should be accorded the right to freely negotiate their individual relocation terms and conditions. Should, for example, the incumbent undertake the project management duties of the relocation effort, the PCS provider should be able to negotiate out, by waiver, the twelve (12) month trial period.

C. The Test Period Should Be Eliminated For Incumbents Who Accept Cash Payments or Conduct Their Own System Project Management

If the incumbent is being paid cash in order to relocate its system, or is designing its own replacement system and performing the related project management duties, the twelve month test period should not be available to such incumbents who undertake the responsibility and liability for relocating their own systems because the incumbents (not the PCS licensees) will be in control of making their facilities comparable.

V. CLEAR DEFINITIONAL STANDARDS ARE NEEDED FOR THE TERM "INTERFERENCE"

It is critical that the Commission adopt clear and unambiguous definitional standards for "interference" since it will be the existence of interference which will trigger a cost-sharing obligation.[13] SBMS opposes the adoption of the AT&T microwave link rectangular area test ("Proximity Threshold") approach[14] because it: (i) is contrary to standard engineering practice and standards for determining when interference occurs and (ii) monetarily disadvantages PCS providers whose innovative system technologies are designed to work around microwave incumbents thereby averting the need for relocation at all.

While the Proximity Threshold method may reduce or minimize some disagreements over

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[13] Notice, para. 24.

[14] See, AT&T Comments, p.8.

interference determinations,[15] it does not ensure fair or controlled timing for the allocation of costs among benefitted parties.

A. The Term Interference Should Be Based Upon Established Objective Industry Standards.

The standard used to determine "interference" is critical to the whole inquiry as to when the relocation obligation arises and whether or not a cost-sharing obligation is triggered. It is important that the Commission adopt objective standards to determine both adjacent and co-channel interference. TIA Bulletin 10-F which is relied upon by the Commission and PBMS as the interference criteria contains only microwave to microwave standards that "do not lend themselves directly to assessing PCS-microwave interference" and does not address adjacent channel interference or differences in terrain.[16] It must be recognized by the Commission that there are complex issues facing the industry resulting from the definitions that are currently used to address "co-channel" and "adjacent channel" interference. The Commission itself has clearly acknowledged that TIA Bulletin 10-F "may not provide a clear standard for determining interference in some situations."[17] For lack of a better standard, SBMS continues to support the TIA interference definitions, either in Bulletin 10-F or a revised version of 10-F which will continue to allow PCS providers to control their relocation costs and time to market by using frequency planning techniques that will permit providers to "work around" microwave incumbents.

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[15] See, GTE Comments, pp.6-8.

[16] See, PBMS Petition, p. 8.

[17] Notice, p. 25.

B. PCS Providers Need the Flexibility to Demonstrate the Avoidance of Interference By Less Expensive Means.

PCS providers should be given the flexibility to demonstrate that interference with a relocated path can be avoided through less expensive means. For example, the simple replacement of older or lessor quality receivers, antennas or filters in use in the existing 2 GHz path may avoid interference entirely. PCS providers may find that by simply replacing a single standard antenna with dual diversity high performance antennas interference can be eliminated and thereby the provider may avoid replacement or relocation of the path. SBMS has estimated the cost of this approach to be significantly less than the cost of replacing a microwave link. Therefore, the Commission should permit PCS providers to demonstrate that less expensive and less obtrusive methods of dealing with interference could be used to satisfy a PCS provider's obligation under the relocation rules.

VI. A CLEAR UNDERSTANDING OF DEPRECIATION IS NECESSARY AS PART OF THE COST-SHARING FORMULA

Under the Personal Communications Industry Association ("PCIA") consensus plan tentatively adopted by the Commission, PCS licensees would be entitled to reimbursement based upon a cost-sharing formula. The crux of the formula is derived by amortizing the cost of relocating a particular microwave link over a ten-year period. As PCS licensees enter the market, their share of the relocation costs will be adjusted to reflect the total number of PCS licensees that have benefited from prior relocations based upon the relative time of market entry.[18] The relative time of market entry will be predicated upon the application of the depreciation rules the Commission ultimately adopts. SBMS submits that depreciation should begin on the date the PCS operator acquires its reimbursement rights under the formula since this date will already be "registered" with the industry

[18] Notice, para. 25.

clearing house and because in-service dates tend to be volatile and may be affected by numerous factors which should not delay the start of the "depreciation clock". Once service is technically possible therefore, the value of the reimbursement rights should begin to depreciate. SBMS believes that in-service dates should never enter into the equation of when the depreciation period begins.

VII. CREATION, PURPOSE AND FUNDING OF AN INDUSTRY CLEARINGHOUSE

PBMS has recommended that a neutral clearinghouse be utilized to administer the cost-sharing plan. Furthermore, PBMS suggests the clearinghouse maintain all costs and payment records related to the relocation of each link.[19] SBMS supports the creation of a clearinghouse but feels the clearinghouse should be designated by the industry. From a practical standpoint, this could be a prospective business venture for any interested company. Historically, the roaming clearinghouses used in the cellular industry were formed as a result of a similar need and as a result of proactive, preexisting vendors capitalizing upon the opportunity of developing such a concept. Prospective vendors interested in establishing a cost-sharing clearinghouse should be solicited by an industry association such as PCIA or the Cellular Telecommunications Industry Association ("CTIA").

SBMS supports, however, the continued ability of parties to reach their own cost-sharing agreements without mandatory use of the industry clearinghouse. Specifically, the clearinghouse would be notified of any such agreements and the link(s) affected. Only if the parties to the agreement seek reimbursement from other PCS providers not subject to the agreements, would additional relevant information be provided to the clearinghouse.[20]

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[19] PBMS Petition, pp. 8-10.

[20] See, GTE Comments, p. 3; CTIA Comments, p. 7; AT&T Comments, p. 6.

SBMS concurs with the Commission that the potential for confidentiality issues arising with respect to information submitted to the clearinghouse are *de minimis* at best.[21] However, SBMS endorses the position that actual cost-sharing and relocation agreements should not have to be filed with the clearinghouse; only relevant summary data supported by affidavit should be required.[22]

VIII. INTERIM LICENSING-STATUS OF INCUMBENT PRIMARY AND SECONDARY MICROWAVE PATHS

Under the Commission's current rules, microwave paths operated by incumbent licensees are entitled to relocation benefits only if they are primary paths.[23] This becomes particularly important because the term "secondary" is a term of art in the industry. While the existing language in the Notice establishes a future date for all existing licenses to revert to "secondary" status,[24] it never addresses the critical issue that incumbent licensees with secondary status licenses are not eligible for relocation rights at all. There are a number of new paths that have been installed since January 16, 1992 and, as the Commission has stated, these paths should not be eligible for primary path status and presumably the accompanying rights to relocation reimbursement.[25] SBMS believes the Commission must clarify this ambiguity concerning an incumbent's eligibility for relocation.

IX. THE COMMISSION SHOULD ESTABLISH SPECIFIC RULES FOR DISPUTE RESOLUTION, INCLUDING MANDATORY USE OF BINDING ARBITRATION

As currently written, the Commission's rules do not establish a specific mechanism for, nor

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[21] Notice, para. 65.

[22] See, PCIA Comments, p.11.

[23] See, proposed Commission rule Section 101.69.

[24] Notice, para. 90.

[25] Notice, para. 86.

an obligation to participate in binding arbitration. SBMS believes the Commission should establish rules requiring incumbent licensees and PCS operators who cannot agree on the comparability of facilities and/or reasonable costs associated in any relocation or any other controversy or claim arising out of or relating to the cost-sharing plan, be settled by binding arbitration administered by the American Arbitration Association ("AAA") under its Commercial Arbitration Rules. According to these rules, any judgment on an award rendered by the arbitrators may be entered in any court having jurisdiction thereof. The Commission should also establish rules regarding the qualifications of the arbitrators, method of payment, venue and any other items of potential concern to the parties. Notices of arbitration awards should be sent to the established cost-sharing industry clearinghouse for proper implementation with appropriate copy to the Commission so they may track all filed cases of abuse and/or disputes surrounding the relocation and cost-sharing process. Failure of a PCS provider or microwave incumbent to comply with the terms of an arbitrarial award should result in sanctions to be imposed by the Commission e.g. the FCC should review any failures to comply with an arbitration award concerning relocation or cost-sharing obligations as part of that parties' renewal process.[26]

X. CONCLUSION

For the reasons stated herein, SBMS supports the establishment of a Rulemaking to consider the numerous important issues of microwave relocation. In addition to the issues raised in the original PBMS Petition, SBMS would seek: (i) a good faith requirement during the voluntary negotiation period, (ii) rejection of the AT&T Proximity Threshold approach to determining interference; (iii) an amended, more meaningful, definition of "comparable facilities", (iv) suitable

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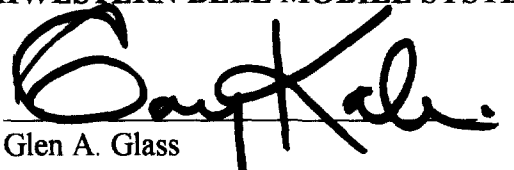
[26] Notice, para. 67.

qualifications to the proposed twelve month trial test period, (v) new proposed interference criteria, (vi) relevant depreciation start dates as part of the cost-sharing formula, (vii) industry composition and selection of the cost-sharing clearinghouse with the ability of private parties to enter into their own cost-sharing agreements outside of the clearinghouse mechanism, (viii) covered changes concerning interim licensing between primary and secondary status licensees and, (ix) full implementation of Alternative Dispute Resolution mechanisms predicated upon binding arbitration under the AAA rules for handling commercial disputes.

Respectfully submitted,

SOUTHWESTERN BELL MOBILE SYSTEMS, INC.

By: 

Glen A. Glass
Vice President & General Counsel
Carol Tacker
General Attorney
Cory Kale
Attorney

17330 Preston Road, Suite. 100A
Dallas, Texas 75252
(214) 733-2000

ATTORNEYS FOR
SOUTHWESTERN BELL MOBILE SYSTEMS, INC.

December 21, 1995

Certificate of Service

I, Cory Kale, an attorney for Southwestern Bell Mobile Systems, Inc. do hereby certify that copies of the foregoing Reply Comments of Southwestern Bell Mobile Systems, Inc. were served on the ~~21st~~ 11th day of ~~December, 1995,~~ January 1996 by first class, U.S. mail, postage prepaid to the following:

A T & T Wireless
Cathleen A. Massey
Vice President-External Affairs
1150 Connecticut Ave.N.W.
4th Floor
Washington, D.C.20036

Alcatel Network Systems, Inc. (ANS)
% Robert J. Miller
GARDERE & WYNNE, L.L.P.
1601 Elm Street, Suite 3000
Dallas, TX 75201

Alexander Utility Engineering, Inc.
Dan R. Banks, R.C.D.D.
Vice President Communications
975 W. Bitters Road
San Antonio, TX 78216

American Gas Association
Michael Baly III,
President & Chief Executive Officer
1515 Wilson Blvd.
Arlington, VA 22209

American Public Power Association
M. Todd Tuten, Esq.
2301 M. St. N.W.
Washington, D.C. 20037-1484

American Petroleum Institute
% Wayne V. Black
KELLER & HECKMAN
1001 G. Street
Suite 500 West
Washington, D.C. 20001

Association of American Railroads
% Thomas J. Keller
VERNER, LIPFERT, BERNHARD,
McPHERSON & HAND, CHARTERED
901 15th St. N.W. Suite 700
Washington, D.C. 20005

Association of Public-Safety
Communications Officials-International, Inc.
(APCO)
% Robert M. Gurss
WILKER, ARTIS, HEDRICK & LANE
1666 K Street, N.W. #1100
Washington, D.C 20006

BellSouth Corporation
Jim O. Llewellyn
1155 Peachtree St. N.E. #1800
Atlanta, GA 30309-2641

BellSouth Corporation
Charles P. Featherstun
1133 21st St. N.W.
Washington, D.C. 20036

Carolina PCS I Limited Partnership
% Jeanne M. Walsh
KURTIS & ASSOCIATES
2000 M. Street, N.W. #600
Washington, D.C. 20036

Cellular Telecommunications Industry Association
Michael Altschul
Vice President & General Counsel
1250 Connecticut Ave. N.W.
Suite 200
Washington, D.C. 20036

Cox & Smith, Inc.
Michael A. Morell
112 East Pecan # 1800
San Antonio, TX 78205

DCR Communications, Inc.
% William R. Richardson, Jr.
WILMER, CUTLER & PICKERING
2445 M Street, N. W.
Washington, D.C. 20037

East River Electric Power Cooperative
Jeffrey L. Nelson
General Manager
121 East First St.
Madison, S.D. 57042

Fixed Point-to Point Communications Section, Network Equipment Division of the Telecommunications Industry Association (TIA)
George M. Kizer, Chairman
2500 Wilson Blvd., Suite 300
Arlilngton, VA 22201

GO Communications Corporation
Leo R. Fitzsimon, Esq.
201 N. Union St. Ste. 410
Alexandria, VA 22314

GTE
Andre J.Lachance
1850 M Street, N. W.
Suite 1200
Washington, D.C. 20036

Industrial Telecommunications Association, Inc.
Mark E. Crosby
President & Chief Executive Officer
1110 N. Glebe Road, Suite 500
Arlington, VA 22201-5720

Infocore Wireless, Inc.
William D. Chamblin III
Chief Operating Officer
661 Moore Road
King of Prussia, PA 19406

Intercel, Inc.
% Michael K. Kurtis
KURTIS & ASSOCIATES, P.C.
2000 M. Street,NW
Suite 600
Washington, D.C. 20036

Interstate Natural Gas Association of America
Terry D. Boss
Vice President
Environment, Safety & Operations
555 13th St. N.W. #300 West
Washington, D.C. 20004

Iowa L.P 136
% James U. Troup
ARTER & HADDEN
1801 K. Street, N. W. #400K
Washington, D.C. 20006-1301

Maine Microwave Associates
Ronald J. Dorler, President
220 Riverside Industrial Parkway
Portland, Maine 04103

Minnesota Equal Access Network Services, Inc. (MEANS)
Michael P. (Rick) Rappe
10300 6th Ave. North
Plymouth, MN 55441

National Rural Electric Cooperative Association
Ronald Kk.k Greenhalgh
Chief Engineer
4301 Wilson Boulevard
Arlington, VA 22203-1860

Omnipoint Communications, Inc.
% Mark J. O'Conner
PIPER & MARBURY L.L.P.
1200 19th Street, N.W.
Seventh Floor
Washington, D.C. 20036

Pacific Bell Mobile Services
%Betsy Stover Granger
4420 Rosewood Drive
4th Floor, Building 2
Pleasanton, CA 94588

Pacific Bell Mobile Services
% Margaret E. Garber
1275 Pennsylvnia Avenue, N.W.
Washington, D.C. 20004

PCS PrimeCo, L.P.
William L. Roughton, Jr.
1133 20th St. N. W.
Suite 850
Washington, D.C. 20036

South Carolina Public Service Authority (Santee Cooper)
% Robert M. Gurss
WILKES, ARTIS, HEDRICK & LANE CHARTERED
1666 K Street, N.W. #1100
Washington, D.C. 20006

Southern California Gas Company
% George L. Lyon, Jr.
LUKAS, McGOWAN, NANCE & GUTIERREZ, CHARTERED
1111 19th Street, N.W. 12th Floor
Washington, D.C. 20036

Sprint Telecommunications Venture
Jonathan M. Chambers
Vice President of Public Affairs
1850 M Street N.W., Suite 1110
Washington, D.C. 20036

Sprint Telecommunications Venture
% Jonathan D. Blake
COVINGTON & BURLLING
1201 Pennsylvania Ave. N. W.
Washington, D.C. 20044

Tenneco Energy
% Julilan L. Shepherd
VERNER, LIPFERT, BERNHARD McPHERSON & HAND, CHARTERED
901 15th St. N..W.
Washington, D.C. 20005

The City of San Diego, California
% Raymond A. Kowalski
KELLER AND HECKMAN
1001 G. St. N.W., Suite 500 W
Washington, D.C. 20002

The Southern Company
% Tamara Y. Davis
McDERMOTT, WILL & EMERY
1850 K Street, N.W. # 500
Washington, D.C. 20006

The Williams Companies, Inc.- Williams Wireless, Inc. (WWI)
John P. Gillispie
Director - Communications Projects
Corporate Development & Planning
The WilTech Group, Inc.
The Tulsla Union Depo
Suite 200
111 East First Street
Tulsa, OK 74103-2808

The Los Angeles County Sheriff's Department and The County of Los Angeles, Internal Services Department
% Robert M. Gurss
WILKES, ARTIS, HEDRICK & LANE CHARTERED
1666 K Street, N. W. #1100
Washington, D.C. 20006

U.S. Airwaves, Inc.
Pamela W. Portin
10500 N. E. 8th Street
Suite 625
Bellevue, Washington 98004

UTAM, Inc.
Willard R. Nichols
Executive Vice President
and Managing Director
1155 Connecticut Ave., N.W. #401
Washington, D.C. 20036

UTC
Jeffery Sheldon
General Counsel
1140 Connecticut Ave. N. W.
Suite 1140
Washington, D.C. 20036

Western Wireless Corporation
% Doane F. Kiechel
GURMAN, BLASK, & FREEDMAN, CHARTERED
1400 16th St. N.W., Suite 500
Washington, D.C. 20554

Cory Kale